Sin Soon Lee Realty Co (M) Sdn Bhd v Fatimah bte Hj Mohamed

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–135–1995
ABDUL MALIK ISHAK J
2 JUNE 1995

Land Law *— Restraints on dealings — Caveat — Removal — Interest in portion of land — Whether whole of land could be caveated — Current law — Whole of land without prohibiting any dealing in other portion of the land — Expressly limited to protect only such interest in that portion of land — Interpretation of the new proviso in s 322(1) of National Land Code 1965 — National Land Code 1965 s 322(1)*

Land Law *— Restraints on dealings — Injunction — Application of entry of caveat limited to portion of land — Rejection by land office on two occasions — No reply from land office on third attempt — Whether a court injunction could be registered for interim protection pending disposal of suit — Removal of injunctive order from register document of title — Lis pendens — High Court's power under s 25(2) of Courts of Judicature Act 1964*

Evidence *— Facts — Admission — Admission where no contradiction of fact*

In early 1954, the defendant orally purchased 10,800 sq ft out of 30,873.15 sq ft of the land comprised in Malay Grant No 2095, Lot No 1996, in the township of Johor Bahru ('the land') from the registered proprietor, Mohamed Noor bin Ngah, for the sum of RM6,000. A 'surat ikrar' evidencing the purchase was signed by Mohamed Noor. The defendant had duly paid the full purchase price on 20 October 1956. Mohamed Noor orally promised to subdivide the land so that the defendant's share would be alienated to her, but this was not done. Mohamed Noor died on 24 March 1956.

In December 1993, the defendant was informed that her share in the land had been sold by the beneficiaries of Mohamed Noor. The defendant filed a Civil Suit No 22–256–1994 against the beneficiaries who became the registered proprietors of the land on 14 February 1994. On 18 February 1994, the plaintiff company purchased the land from the new registered proprietors at a sum of RM1.48m, and on 4 March 1994 it entered a private caveat against the land to protect its interest. The defendant also entered a private caveat against the land to protect her interest. Her private caveat was cancelled by the registrar after she was served with a notice of intended removal and advised that the new proviso to s 322(1) of the National Land Code 1965 ('NLC') would bar her from caveating part of the land, which was the law at that time.

After the decision in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 on 9 September 1994, the defendant had on two occasions, namely, 18 October 1994 and 27 October 1994, applied to enter a private caveat on her interest in the portion of the said land but the land office rejected both her applications, contrary to the decision in *Chor Phaik Har*'s case. On 1 March 1995, the defendant applied to enter a private caveat again but there had been no reply from the land office.

In the meantime, the defendant through Civil Suit No 22–256–1994 successfully obtained on 5 November 1995 an injunctive order to prevent the beneficiaries, the defendants in that suit, from generally dealing with the said land. The injunctive order was registered on the register document of title at the land office at Johor Bahru.

The plaintiff company applied to remove the injunctive order from the register document of title so that it could register the said land in its name.

Held, dismissing the application:

(1) The current position of the law in the country is that a person who claims a registrable interest in a portion of land may caveat the whole land, provided that the caveat is expressly limited to protect only that claim, which must be an interest recognized under the NLC as being either registrable or entitled to protection.

(2) Although there was no machinery for registering an injunction on the register document of title under the NLC, by analogy to the interim protection of land by way of the registration of a lis pendens as reflected in *Damodaran v Vesudevan* [1975] 2 MLJ 231, the court allowed the registration of an injunction for the interim protection of the part interest in said land pending disposal of the suit.

(3) An injunctive order would temporarily protect the defendant's part interest in the said land in view of s 25(2) and para 6 of the schedule to the Courts of Judicature Act 1964 because: (i) the land office had refused on two occasions to accept her applications for entry of private caveats in spite of the decision of the Federal Court in *Chor Phaik Har*; and (ii) the fate of the defendant's third application for entry of the private caveat was still unknown.

(4) The failure to contradict what was asserted in the affidavit was an admission of the fact that was asserted.

[Bahasa Malaysia summary

Pada tahun 1954, defendan telah secara lisan membeli 10,800 kaki persegi daripada 30,873.15 kaki persegi tanah yang dipegang

di bawah Malay Grant No 2095, Lot No 1996, di Bandar Johor Bahru ('tanah tersebut') daripada tuanpunya berdaftarnya, Mohamed Noor bin Ngah, untuk jumlah RM6,000. Satu 'surat ikrar' menunjukkan pembelian tersebut telah ditandatangani oleh Mohamed Noor. Defendan telah membayar harga pembelian penuh pada 20 Oktober 1956. Mohamed Noor berjanji secara lisan untuk memecahkan tanah tersebut supaya syer defendan dapat diberimilik kepada defendan, tetapi tiada apa-apa dilakukan. Mohamed Noor meninggal dunia pada 24 Mac 1956.

Pada bulan Disember 1993, defendan diberitahu bahawa syernya dalam tanah tersebut telah dijual oleh benefisiari-benefisiari Mohamed Noor. Defendan telah memfailkan satu Guaman Sivil No 22–256–1994 terhadap benefisiari-benefisiari tersebut yang menjadi tuanpunya-tuanpunya berdaftar tanah tersebut pada 14 Februari 1994. Pada 18 Februari 1994, syarikat plaintif membeli tanah tersebut daripada tuanpunya-tuanpunya berdaftar baru dengan jumlah RM1.48 juta, dan ia telah pada 4 Mac 1994 memasukkan suatu kaveat persendirian terhadap tanah tersebut untuk menjaaga kepentingannya. Defendan juga memasukkan suatu kaveat persendirian terhadap tanah tersebut untuk menjaga kepentingannya. Kaveat persendiriannya telah dibatalkan oleh pendaftar hakmilik selepas dia disampaikan dengan suatu notis tentang niat mengalihkan kaveat dan setelah dia dinasihati bahawa proviso baru kepada s 322(1) Kanun Tanah Negara 1965 ('KTN') melarangnya daripada mengkaveat sebahagian tanah tersebut, yang menjadi undang-undang pada masa itu.

Selepas keputusan kes *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 pada 9 September 1994, defendan telah dua kali, iaitu pada 18 Oktober 1994 dan 27 Oktober 1994, memohon untuk memasukkan suatu kavat persendirian atas kepentingannya di dalam sebahagian tanah tersebut tetapi Pejabat Tanah dan Galian menolak kedua-dua permohonannya, bertentangan dengan keputusan dalam kes *Chor Phaik Har*. Pada 1 Mac 1995, defendan memohon sekali lagi untuk memasukkan kaveat persendirian tetapi tiada jawapan diberi oleh Pejabat Tanah dan Galian sehingga kini.

Sementara itu, defendan melalui Guaman Sivil No 22–256–1994 berjaya pada 5 November 1994 mendapat suatu perintah injunksi untuk melarang benefisiari-benefisiari itu, sebagai defendan-defendan dalam guaman itu, daripada membuat apa-apa urusniaga dengan tanah tersebut. Perintah injunksi tersebut telah didaftarkan pada dokumen hakmilik daftaran di Pejabat Tanah dan Galian di Johor Bahru.

Syarikat plaintif memohon untuk mengetepikan perintah injunksi tersebut daripada dokumen hakmilik daftaran supaya ia dapat mendaftarkan tanah tersebut dalam namanya.

Diputuskan, menolak permohonan itu:

(1) Undang-undang semasa dalam negara adalah bahawa seseorang yang menuntut kepentingan berdaftar dalam sebahagian tanah boleh mengkaveat kesemua tanah itu, asalkan kaveat itu secara nyata dihadkan untuk melindungi tuntutan itu sahaja, yang mestilah satu kepentingan yang diiktiraf oleh KTN sama ada sebagai kepentingan yang boleh didaftarkan atau kepentingan yang berhak untuk perlindungan.

(2) Walaupun tidak terdapat apa-apa mekanisme untuk mendaftarkan perintah injunksi pada dokumen hakmilik daftaran di bawah KTN, sebagai analogi kepada perlindungan interim tanah melalui pendaftaran lis pendens yang terbayang dalam kes Da*modaran v Vasudevan* [1975] 2 MLJ 231, mahkamah membenarkan pendaftaran perintah injunksi untuk perlindungan interim bagi kepentingan dalam sebahagian tanah tersebut sementara menunggu penyelesaian guaman tersebut.

(3) Suatu perintah injunksi akan melindungi kepentingan defendan dalam sebahagian tanah tersebut secara sementara memandangkan s 25(2) dan perenggan 6 jadual kepada Akta Mahkamah Kehakiman 1964 kerana: (i) Pejabat Tanah dan Galian telah menolak dua kali permohonan defendan untuk memasukkan kaveat persendirian meskipun keputusan Mahkamah Persekutuan dalam kes *Chor Phaik Har v Farlim Properties Sdn Bhd*; dan (ii) nasib permohonan ketiga defendan untuk memasukkan kaveat persendirian belum diketahui lagi.

(4) Kegagalan untuk menyangkal fakta yang dideposkan dalam afidavit adalah pengakuan fakta yang dideposkan.]

Notes

For cases on caveats and injunctions and restraints on dealings generally, see 8 *Mallal's Digest* (4th Ed) paras 1687–1779; [1989] *Mallal's Digest* paras 1086–1090; [1990] *Mallal's Digest* paras 838–844; [1991] *Mallal's Digest* paras 1319–1328; [1992] *Mallal's Digest* paras 1190–1201 and 1260; [1993] *Mallal's Digest* paras 970–980; [1994] *Mallal's Digest* paras 1621–1648, in particular paras 1621 and 1644.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (folld)

Char Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (folld)

Damodaran v Vasudevan [1975] 2 MLJ 231 FC (folld)

Dato' Ong Kian Seng v Lim Kut Sheong & Ors [1992] 1 CLJ 409 (refd)

Heng Bak Teong & Anor v Ng Ah Seng [1988] 1 MLJ 406 (distd)

Mosbert Bhd (In Liquidation) v Stella D'Cruz [1985] 2 MLJ 446 (refd)
N Vangedasalam v Mahadevan & Anor [1976] 2 MLJ 161 (folld)
Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 33 (folld)
Pok Kew Chai v Yeoh Thian Seng & Anor [1975] 1 MLJ 220 (refd)
Registrar of Titles Johore v Temenggong Securities Ltd [1976] 2 MLJ 44 (refd)
Saif Ali v Sydney Mitchell & Co [1980] AC 198; [1978] 3 WLR 849; [1978] 3 All ER 1033 (refd)
T Damodaran v Choe Kuan Him [1979] 2 MLJ 267 (distd)
Tan Heng Poh v Tan Boon Thong & Ors [1992] 2 MLJ 1 (refd)
Tee Chin Yong v Ernest Jeff [1963] MLJ 118 (refd)
Woo Yok Wan v Loo Pek Chee [1975] 1 MLJ 156 (refd)
Zeno Ltd v Prefabricated Construction Co (Malaya) Ltd & Anor [1967] 2 MLJ 104 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2), Sch 1 para 6
FMS Land Code (repealed) s 166
National Land Code 1965 ss 322(1), 323(1), (2), 326, 327

Adi Radlan bin Tan Sri Abdul Rahman (*Mak, Ng, Shoa & Kee*) for the plaintiff.
Edwin J Savariraj (*Abdullah & Zainudin*) for the defendant.

Cur Adv Vult

Abdul Malik Ishak J: In early 1954, the defendant orally purchased four lots in the approximate region of 10,800 sq ft out of 30,873.15 sq ft of land comprised in Malay grant 2095, Lot No 1996, in the township of Johore Bahru, in the district of Johore Bahru ('the said land') from the registered proprietor Mohamed Noor bin Ngah ('Mohamed Noor') for a paltry sum of RM6,000. To protect her interest, the defendant managed to convince Mohamed Noor to record that purchase in writing and this was done in the form of a 'surat ikrar' dated 1 May 1954. In fact, the defendant started paying the price of the said land on instalment basis since 2 January 1954 till the full sum was disbursed on 20 October 1956. Mohamed Noor agreed and orally promised to sub-divide the said land so that the defendant's share would be alienated to her. This remained a mere promise until Mohamed Noor died on 24 March 1956 (see the death certificate in exh 'FM2'). After the death of Mohamed Noor, the defendant's husband by the name of Othman bin Mohamed (since deceased) approached Mohamed Noor's son by the name of Yaakub on 16 September 1956. At that meeting, the defendant's late husband handed RM500 to Yaakub to enable him to extract the letters of administration to Mohamed Noor's land. This would certainly expedite the sub-division of the said land. Nothing, however, came out of it.

In December 1993, the defendant was told by her daughter by the name of Rafeah bte Hj Othman that her share to the said land had been sold by the beneficiaries of Mohamed Noor, namely, Talib, Taib, Hassan @ Ahmad and Sa'adiah. These beneficiaries were the children of Mohamed Noor and they were subject to Civil Suit No 22-256 of 1994 filed by the defendant. In that civil suit, the beneficiaries were the defendants and the present defendant was the plaintiff. To protect her interest to the said land, the defendant had on 22 March 1994 lodged a private caveat on the said land.

On 16 September 1993, Talib applied to the Pejabat Tanah Johor Bahru to distribute the estate of his late father, Mohamed Noor, and on 6 January 1994, the Pentadbir Tanah, Johor Bahru distributed the said land to Talib (2/7 share), Taib (2/7 share), Hassan @ Ahmad (2/7 share) and Sa'adiah (1/7 share). Eventually, on 14 February 1994, the said land was transferred to the beneficiaries of Mohamed Noor and they became the registered proprietors of the said land.

Meantime on 18 February 1994, the plaintiff by a sale and purchase agreement bought the said land from the registered proprietors at a whopping price of RM1,481,911.20 — a hefty amount, a far cry from the price paid for by the defendant for her share of 10,800 sq ft out of the said land. The plaintiff lodged a private caveat on the said land on 4 March 1994 to protect their interest.

The defendant deposed in her affidavit that after 20 October 1956 she held a beneficial interest to her portion of the said land and that, at that point of time, Mohamed Noor merely held her portion as her bare legal trustee. The same legal position was also said to be true in so far as the children of Mohamed Noor were concerned when they became the registered proprietors of the said land. As bare legal trustees, it was said that the children of Mohamed Noor were not entitled to sell the defendant's portion of the said land.

At this juncture, it is interesting to point out that the defendant's affidavit-in-reply in encl 9 stood in isolation in that whatever was asserted by the defendant therein remained intact in that the plaintiff did not make any attempt to file an affidavit in rebuttal to contradict what was asserted by the defendant. Such failure is now considered to be an admission of the fact that is asserted (*Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332). Thus, the assertions by the defendant that she held the beneficial interest to her share of the said land and that both Mohamed Noor before his death and Mohamed Noor's children after his death held her portion of the said land as bare legal trustees were not contradicted at all. Reverting back to the facts of the case. On 10 February 1994, Talib attempted to settle the problem when he tried to reimburse RM6,000 to the defendant on the ground that that sum represented the amount owed by Mohamed Noor. This was rejected outright by the defendant and she told him flatly in his face that RM6,000 represented the purchase price to her half share.

On 20 February 1994, the defendant received a notice of intended removal of her caveat from the registrar and by that notice her caveat shall lapse and be of no effect at the expiry of two months as specified in the said notice unless before the expiry of that period the registrar shall have been served with an order of the court extending the time provided in the said notice. At that point of time, the defendant sought legal advice and she was advised that the new proviso to s 322(1) of the National Land Code 1965 ('NLC') would bar her from caveating part of the said land and, consequently, she did nothing and she let the registrar cancel her caveat on 24 August 1994. That new proviso to s 322(1) of the NLC came into effect from 25 March 1985 vide Act A587 and it reads as follows:

> Provided that such a caveat shall not be capable of being entered in respect of a part of the land.

Wong Kim Fatt in his brilliant article entitled 'Twenty-Five Years of the Caveat System under the National Land Code 1965' published in 1991 *Singapore Journal of Legal Studies* at pp 256 and 257 commented on the new proviso to s 322(1) of the NLC in the following erudite terms:

> A plain reading of the proviso would indicate that a part of the land is incapable of being caveated. This seems strange as it is difficult to comprehend the legislature as taking away the right of the bona fide purchaser for value or chargee to protect his interest in a part of the land in question. It would now appear that for every interest in the part of the piece of land, being not expressed as an undivided share, the caveator must caveat the whole of the land. The particular interest claimed may be stated in Form 19B and in the statutory declaration supporting the application for the entry of the caveat. In order not to restrict the registered proprietor in any dealings in the remainder of the land where the caveator claims or has no interest, the caveator may indicate in his statutory declaration that he will consent to such dealings under s 322(5)(b) of the Code. In an appropriate case, it is submitted that the High Court has the power to amend the caveat if it considers such an amendment to be just under s 327(1) of the Code as the Full Court did in the Queensland case of *Queensland Estate Pty Ltd v Co-ownership Land Development Pty Ltd* (1969) Qd R 150, followed by Syed Othman J (as he then was) in the *Chng Sin Poey* case in which the learned judge amended the caveat by consent of counsel for both parties.

At this juncture, it is pertinent to set out the law. Prior to 25 March 1985, the law can be gleaned from the cases reported in the journals. The three decisions in order of seniority would be *Tee Chin Yong v Ernest Jeff* [1963] MLJ 118; *Woo Yok Wan v Loo Pek Chee* [1975] 1 MLJ 156; and *Pok Kew Chai v Yeoh Thian Seng & Anor* [1975] 1 MLJ 220. Briefly, these cases decided that a caveator could not caveat the whole land if he was interested in only a portion of it.

Tee Chin Yong's case was decided by Ismail Khan J (as he then was) under s 166 of FMS Land Code (it is pertinent to mention that the

FMS Land Code was wholly repealed by the NLC with effect from 1 January 1966). Section 166 of the FMS Land Code reads as follows:

> The grantor of any instrument of trust or a beneficiary or a guardian or next friend of any minor beneficiary or a trustee or any person claiming title to or registrable interest in land may present a caveat to the effect that such land shall not be transferred, charged or leased by the proprietor either:
>
> (a) absolutely, or
>
> (b) except in such manner and to such extent as in such caveat may be expressed, or
>
> (c) until notice shall have been served on the caveator, or
>
> (d) unless the transfer, charge, or lease be expressed to be subject to the claim of the caveator as expressed in such caveat, or
>
> (e) except subject to any conditions expressed in such caveat.

Briefly, the facts in *Tee Chin Yong*'s case can be stated thus. There, the plaintiff, who was the caveator, sued the defendant for specific performance of a contract for the sale to him of only a portion of the land in question in Seremban. It was the defendant's case that the plaintiff had no registrable interest in the land and therefore could not present any caveat. On the other hand, the plaintiff contended that he had an interest in the land arising out of his contract which gave him the right to present the caveat. The learned judge approached the problem by deciding whether the interest claimed was caveatable or not. Then he proceeded to the next question of whether a person claiming an interest in a specific portion of a piece of land was entitled to lodge a caveat over the whole land. He decided in the negative. This was what his Lordship said at p 119:

> It is quite clear that in respect of the remaining portion of the land he is not entitled to lodge any caveat whatsoever. I do not think that a caveat is divisible in the same way that certain clauses in a contract may in proper circumstances be severable from the rest. Therefore, if the caveats lodged by the plaintiffs were partially invalid such invalidity renders those caveats wholly null and void and of no effect. They should not have been registered in the first place because the Registrar of Titles had no authority outside the four walls of the Land Code.

In *Woo Yok Wan*'s case, Ajaib Singh J (as he then was) had to decide the same question under the then s 322 of the NLC which reads as follows:

> (1) A caveat under this section shall be known as a 'private caveat', and —
>
> (a) may be entered by the Registrar on the register document of title to any land at the instance of any of the persons or bodies specified in section 323;
>
> (b) shall have the effect specified in sub-section (2) or (3), according as it is expressed to bind the land itself or merely a particular interest therein.

The brief facts of *Woo Yok Wan*'s case were these. There the defendant was the registered proprietor of a piece of land in Seremban on which was erected a double-storey shophouse. The defendant proprietor, by written tenancy agreement, let out the front portion of the ground floor and a room at the rear of the shophouse to the plaintiff. However, the shophouse was in a dangerous and deplorable condition and this prompted the Town Council to serve an order on the defendant, prohibiting occupation of the shophouse. On receipt of this order, the defendant terminated the tenancy agreement and sold the shophouse, causing the plaintiff to enter a caveat against the whole land and to sue the defendant for specific performance. As an aggrieved party, the defendant applied to the High Court for the removal of the caveat under s 327 of the NLC. The learned judge ordered the removal of the caveat and in so doing he followed the decision of *Tee Chin Yong*'s case. This was what his Lordship said (at pp 159 and 160):

> Under s 323(2) of the National Land Code a person wishing to apply for the entry of a caveat has to do so in a prescribed form specifying therein the nature of his claim and whether the caveat is to be expressed to bind the land or a particular interest only. A person whose interest extends only to a specific portion of a piece of land is not entitled to enter a caveat over the whole of the land.

Pok Kew Chai's case was decided by Hashim Yeop Sani J (as he then was). In that case, the applicant took a lease of ten years in respect of the ground floor of a two-storey shophouse in Seremban. That shophouse was erected on the land registered in the name of Foo. Foo charged the land by way of security for a loan to Yeoh, the first respondent, who had not become the registered proprietor of the land when he, as registered chargee, applied under s 326 of the NLC to remove the applicant's private caveat entered on 2 January 1974 against the whole land on the ground that the applicant's interest was in respect of the ground floor only. The learned judge ordered the removal of the caveat following *Tee Chin Yong*'s case and *Zeno Ltd v Prefabricated Construction Co (Malaya) Ltd & Anor* [1967] 2 MLJ 104.

I can only assume that these three cases must have hindered the defendant from lodging a private caveat to protect a portion of her interest in the said land. From the recital of the facts, between 1 May 1954 when the 'surat ikrar' was signed till 21 March 1994, the defendant did not lodge a private caveat to protect her interest to that small portion of hers. It was only on 22 March 1994 that she lodged the private caveat and even then this private caveat lasted only till 24 August 1994 when the registrar cancelled it upon an application by the children of Mohamed Noor.

In 1976, in a landmark decision, the then Federal Court in *N Vangedasalam v Mahadevan & Anor* [1976] 2 MLJ 161 overruled *Tee Chin Yong*'s case, *Woo Yok Wan*'s case and *Pok Kew Chai*'s case. Briefly, in *Vangedasalam*'s case, the caveat affected 18,000 sq ft of a large piece of alienated land. The High Court ordered the caveat to be

removed but on appeal, the Federal Court ordered the caveat restored pending disposal of the civil suit without, however, prohibiting any dealing in the land expressed to be subject to the claim of the caveator. Suffian LP in an illuminating judgment had this to say: A

> I am of the opinion that under the above provisions you either caveat the whole land or not at all, that you caveat the whole land even if you claim only a portion of it and if you caveat the whole land but claim only part of it, then you should comply with para (d) of s 166. Thus in the circumstances in *Tee Chin Yong* you should state that the lands shall not be transferred, charged or leased by the proprietor unless the transfer, charge or lease is expressed to be subject to the claim of the caveator as expressed in the caveats. This should not embarrass the registered proprietor unduly, because under s 169 the registering authority may register any memorandum of transfer etc executed by the proprietor if it complies with the requirement of the caveat. B C

Now, the question to ask is this: Why didn't the defendant lodge her private caveat to protect that portion of her interest after *Vangedasalam* was decided? No answer was forthcoming from the defendant. The plaintiff's counsel advanced an argument that the defendant should have lodged a private caveat to protect that part of her interest after *Vangedasalam*. Be that as it may, *Vangedasalam* remained good law from 1976 till 25 March 1985 when the new proviso to s 322(1) of the NLC, as adverted to in the early part of this judgment, was inserted therein. D E

In July 1985, the new proviso to s 322(1) of the NLC was described by Seah SCJ (as he then was) in *Mosbert Bhd (In Liquidation) v Stella D' Cruz* [1985] 2 MLJ 446 in these words :

> This amendment came into force on 25 March 1985 and because of this, that part of the judgment of this court dealing with the private caveat lodged by the respondent now seems to be of academic interest only. F

Shaik Daud J (now JCA) had the honour of interpreting the proviso to s 322(1) of the NLC in *Dato' Ong Kian Seng v Lim Kut Sheong & Ors* [1992] 1 CLJ 409. His Lordship succinctly said at p 411 : G

> It is very clear that on a true construction of the proviso, no one may caveat the whole land if he claims only a portion of it.

His Lordship continued further at p 412 :

> It is my view that by the new proviso the intention of the legislature is clear, one cannot caveat part of the land must mean that if one has an interest in part of the land one cannot caveat either that part or the whole land. In other words one cannot caveat the land at all. H

The then Supreme Court consisting of Jemuri Serjan CJ (Borneo), Mohamed Azmi and Mohamed Yusoff SCJJ in *Tan Heng Poh v Tan Boon Thong & Ors* [1992] 2 MLJ 1 (SC), remarked that the new proviso to s 322(1) of the NLC had brought about a very significant change in the law which prohibited the entry of a caveat on a part of the land. However, the decision of Shaik Daud J in *Dato' Ong Kian Seng*'s case I

A was not considered by the then Supreme Court. His Lordship Mohamed Azmi SCJ (now FCJ) delivered the judgment of *Tan Heng Poh*'s case and this was what he said (at p 8) :

> We took this to mean that as from 25 March 1985, no caveat could be entered by the registrar against any land where the caveator was interested in a specific portion of it even though the effect was expressly intended to be limited only to that specific portion.
>
> In our view the new proviso in s 322(1) had indeed affected the judgment of the Federal Court in *N Vangedasalam v Mahadevan & Anor*. With the greatest of respect, the learned Lord President had correctly stated the law as it stood ... .

B

C In another part of the judgment, his Lordship Mohamed Azmi had this to say (pp 8–9) :

> The amendment has changed the law by expressly prohibiting the entry of a caveat in respect of a part of alienated land. The nature and effect of private caveats under s 322 is now subject to an omnibus proviso that, such a caveat shall not be capable of being entered in respect of a part of the land. Thus, notwithstanding the fact that a person can bring himself under one of the categories of persons under s 323(1) at whose instance a private caveat may be entered, the registrar is now prevented from entering a caveat whether expressly intended to bind the land or merely a particular interest therein, if the caveator's claim or interest under s 323(1) relates to only part of the land. In our opinion, this is the only reasonable interpretation of the new proviso. Any other interpretation would appear to make it meaningless, and inconsistent with the torrens system of giving certainty and indefeasibility to registration of land title, save for fraud or misrepresentation in the transfer or registration itself.

D

E

F The decision in *Tan Heng Poh*'s case was shortlived. It was reviewed by a full bench of the present Federal Court on 9 September 1994 (Abdul Hamid Omar CJ, Eusoff Chin CJ (Malaya), Edgar Joseph Jr, Mohamed Dzaiddin and Lamin FCJJ) in the case of *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345. Writing for the Federal Court, his Lordship Edgar Joseph Jr FCJ held, inter alia, that the proviso to G s 322(1) of the NLC is purely declaratory of the principles enunciated in *N Vangedasalam v Mahadevan & Anor* (supra) and that a person who claims a registrable interest in a portion of land may caveat the whole land, provided the caveat is expressly limited to protect only that claim, which must be an interest recognized under the Code as being either H registrable or entitled to protection.

At p 356 of the judgment, his Lordship Edgar Joseph Jr FCJ said tersely :

> True it is that the proviso to s 322(1) prohibits the entry of a caveat over part of the land, yet it says nothing about the validity of a caveat over the whole land but whose effect is limited to protect a claim to a registrable interest in a portion or an undivided share thereof.

I

Chor Phaik Har's case revived *Vangedasalam*'s case and that is the current position of the law in the country.

Reverting back to the facts of the case. The defendant through Civil Suit No 22–256 of 1994 successfully applied before my immediate predecessor on 5 November 1994 to injunct the children of Mohamed Noor from generally dealing with the said land. The precise words of the court order were:

> ... Adalah diperintahkan dan diarahkan:
>
> (1) bahawa defendan-defendan yang dinamakan di atas sama ada oleh mereka sendiri, agen-agen atau pengkhidmat-pengkhidmat mereka atau dalam kaedah yang lain di halang melalui satu injunksi dari memindahmilik, menjual, menggadaikan atau mengujudkan lain-lain sekatan-sekatan dengan apa-apa cara pun di atas harta tersebut yang terkandung di dalam CT 967 Lot 1996 dalam bandaran Johor Bahru sehingga selepas perbicaraan tindakan ini; dan
>
> (2) bahawa tiada perintah mengenai kos.

The court order dated 5 November 1994 was registered at the land office Johor Bahru on 22 November 1994 and this was endorsed on the issue document of title to the said land.

Immediately after the decision in *Chor Phaik Har*'s case, the defendant had on two occasions, namely, on 18 October 1994 and 27 October 1994 attempted to lodge private caveats on portions of her interest on the said land but on both occasions the land office at Johor Bahru rejected her applications. A third attempt was made by her on 1 March 1995 to lodge a private caveat on the said land to the extent of her interest therein but there was no reply forthcoming from the land office at Johor Bahru.

On 27 October 1994 and on 1 March 1995 when the defendant put in her applications to caveat the portions of her interest to the said land, the case of *Chor Phaik Har* was brought to the attention of the land office, Johor Bahru and a photostat copy of that judgment was even enclosed therein for scrutiny of the land office personnel (see exhs 'FM 13' and 'FM 15' in encl 9), yet the land office Johor Bahru had the audacity to reject her application dated 27 October 1994 and still kept quiet and remained reticent about her application dated 1 March 1995. This is where the State Legal Adviser, Johor Bahru should step in and advise the land office, Johor Bahru accordingly. Be that as it may, it was argued before me that the injunction issued by my predecessor dated 5 November 1994 should not be registered on the register document of title as it contravened the NLC. In short, Encik Adi Radlan bin Abdul Rahman, the learned counsel for the plaintiff, argued that the NLC makes no provision for the registration of an injunction and this court should remove that injunction from the register document of title. Encik Edwin J Savariraj, the learned counsel for the defendant, argued that the defendant's private caveat that was lodged on 22 March 1994 was cancelled by the registrar, upon notice given to the defendant, on 24 August 1994 without the defendant applying to the court to extend that private caveat as provided under s 326(2) of the NLC because of the new proviso to s 322(1) of the NLC that prevents

a caveator from caveating the whole land if he is interested in only a small portion of it and this was affirmed by the then Supreme Court in the case of *Tan Heng Poh*. Encik Edwin J Savariraj sought a parallel with the situation that arose in *Damodaran v Vasudevan* [1975] 2 MLJ 231 FC where the Federal Court relied on s 25(2) of the Courts of Judicature Act 1964 (Act 91) and held that the High Court has the power to provide for the interim protection of property by the registration of a lis pendens. Likewise it was argued here that by the same token this court should provide for the interim protection of the said land by the registration of an injunction. In *Damodaran*, Suffian LP in a well-reasoned judgment said at p 231:

> It is common ground that in Malaya there is no machinery whereby a lis pendens can be registered either under our Rules of the Supreme Court or under the National Land Code.

At p 232, Suffian LP continued:

> With all due respect, the question for our determination is not what is the position of a purchaser who bought the disputed lands while the lis pendens order remained in force, but simply whether or not under the law as it exists today the High Court has power to provide for the interim preservation of property the subject of litigation by the registration of a lis pendens. Having given this matter anxious consideration I am of the opinion, following with respect the Singapore Court of Appeal in *Singapore Pak Hock Pai Athletic Association v Yiu Pek Heng* [1973] 2 MLJ 6, that our High Court does have that power.
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> In my judgment, sub-s (2) of s 25 of our Courts of Judicature Act is quite clear. It does not say that our High Court may provide for the interim protection of property the subject of litigation by the registration of a lis pendens, if and only if written law or rules of court so provide, as is contended by Mr Mooney. It says quite plainly that the High Court shall have power to provide for the interim protection of such property by the registration of a lis pendens. The proviso in my judgment means only this: that if there are written laws or rules of court relating to the same, then this power must be exercised in accordance with them. The proviso does not mean that if there are no written laws or rules of court relating to the same, then the power cannot be exercised at all.

Lee Hun Hoe CJ (Borneo) delivering a separate concurring judgment in *Damodaran* said tersely that (at p 234 D-F):

> The absence of provision for registration does not mean that the parties are not bound by the lis affecting the land in dispute. It is more consonant with the scope and purpose of our National Land Code that a claim which is the subject of a lis should be recognised and accepted in the same way as we recognise and accept other interests which are incapable of registration. One of such interests is an unregistered lease. The parties to such a lease will be bound even if it is not registered. We are not concerned with a purchaser but the parties to the suit. If the High Court has the power to make a lis pendens order binding on the parties then the appeal must fail.
>
> The absence of provisions for registration is immaterial as between the parties to the dispute in respect of the land. The lis pendens order

> remains valid in every respect except perhaps against a purchaser. It is a matter for the legislature to decide whether there should be legislation for registration of a lis pendens or other instruments.

Unfortunately, Lord Diplock in *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267 at p 270 disapproved the decision of the Federal Court in *Damodaran*. This was what he said:

> It follows that, in their Lordships' view, the entry on the register of an order of lis pendens is a mere brutum fulmen. Even if it be lawful to make such an entry at all, it serves no useful purpose and their Lordships would suggest that the precedent set by *Damodaran v Vesudevan* is one which ought not to be followed. Where by reason of a pending action in which the title to registered land is in dispute, it would be just to suspend the registered proprietor's right to transfer the land pending the determination of the action, the proper and effective way of doing so is by entry of a private caveat.

To apply the decision of *Choe Kuan Him* to the present case would mean that the remedy of the defendant would be in the nature of lodging a private caveat. But how could she lodge a private caveat in view of the new proviso to s 322(1) of the NLC and the decision of the then Supreme Court in *Tan Heng Poh*? Even after *Chor Phaik Har*, the registrar refused to entertain the defendant's application for entry of a private caveat to a part of her land. It seems to me that in that dilemmatic situation she had no choice but to rely on the injunction which she obtained before my immediate predecessor on 5 November 1994 vide Civil Suit No 22-256-94 and using that injunctive order she injunct the said land which is the subject of dispute before me. The plaintiff before me now wishes to have that injunctive order registered on the register document of title to the said land to be removed so that they could register the said land in their name.

I am not concerned about what the law ought to be but rather as to what is the law. Just like lis pendens, there is no machinery of registering an injunction under the NLC. The NLC makes provisions for two kinds of restraint on dealings, namely, caveats and prohibitory orders. Like lis pendens, an injunction as a form of restraint on dealings are set out in s 25(2) and para 6 of the schedule to the Courts of Judicature Act 1964 (Act 91). A caveat, a prohibitory order, a lis pendens and an injunction are entered under different circumstances. A caveat, if its purpose is to preserve the status quo of the parties pending disposal by the court, is usually entered by the caveator before any judicial proceeding is initiated. In *Registrar of Titles Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44, Lord Diplock said that: 'The purposes of a private caveat is to preserve the status quo pending the taking of timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the courts.' On the other hand, a prohibitory order is only entered after successful court action by the judgment creditor. Lis pendens is entered when court action is pending.

Whereas an injunction is described as a judicial order where the party is generally ordered to refrain from doing or to do a particular act

A or thing and an interlocutory injunction is generally granted to preserve the status quo pending trial of matters in dispute.

It is appropriate to mention here that transfers, leases, tenancies, charges, liens and easements are capable of being registered under the NLC.

B In 1988, Mohamed Dzaiddin J (now FCJ) in *Heng Bak Teong & Anor v Ng Ah Seng* [1988] 1 MLJ 406 without considering *Choe Kuan Him*'s case came to the same conclusion as what Lord Diplock did in that case. In *Heng Bak Teong*'s case, the injunctive order granted by the court in another civil suit against the registered owner restraining the sale and charge of the said property to a third party was presented to C the Registry to Titles, Pulau Pinang and the registrar lodged the said order as 'Perintah Menengah' which meant under the NLC prohibitory order. The applicant sought to set aside that court order and for an order directing the Registrar of Land Titles, Penang, to cancel the lodgment of the said order on the title of the property in question. His D Lordship Mohamed Dzaiddin J (now FCJ) resolved the matter in this way (p 408, right hand column at B to F) :

> Thus, in the present case, the court had rightly granted the said order restraining the registered owner from transferring or charging or in any way dealing with the said property until after the trial of action or further E order. But, is the said injunction order registrable as a restraint against dealing under the National Land Code? If it is registrable, then the order binds subsequent dealings. In my judgment, an injunction does not accord statutory protection of the purchaser's interest under the National Land Code and therefore is not registrable or indorsable on the title to the said property. The protection which the respondent has in the present F case is for lodgment of a private caveat or, if he is a judgment creditor, to apply to court for a prohibitory order under s 335 of the National Land Code. In the case of the former, it is for him to establish that he has a caveatable interest in the said property. As none of the above applies in the present case, I find that the Registrar of Land Titles was wrong in registering the said order of court as a prohibitory order nor is there any provision in the National Land Code for an injunction order to be G registered on the title to the said property binding against all and sundry.

Heng Bak Teong's case did not consider the decisions of Suffian LP and Lee Hun Hoe CJ (Borneo) in *Damodaran*'s case. Why must we have s 25(2) and para 6 of the schedule to the Courts of Judicature Act 1964 (Act 91) if we cannot apply it at all? The legislature let that section and H that paragraph to the schedule to remain all these years despite the adverse comments of Lord Diplock in regard to *Damodaran*'s case in the course of delivering his judgment in *Choe Kuan Him*'s case. The defendant in this case, on affidavit evidence, has shown that she purchased a part of the said land from Mohamed Noor on 1 May 1954 I and surely as a purchaser she is entitled to protect her interest. For fear of repetition, the defendant's position was constrained by the new proviso to s 322(1) of the NLC and the then Supreme Court case of *Tan Heng Poh*. Lee Hun Hoe CJ (Borneo) in *Damodaran*'s case aptly described the plaintiff there in a pathetic manner and those words merit

reproduction: 'Assuming that lis pendens cannot be registered under the National Land Code or elsewhere then the effect is that a purchaser cannot be bound by an interest which is not registered.' Must the defendant here be compartmentalised in that pathetic role? As stated earlier, she tried without success twice, after the decision of *Chor Phaik Har,* to lodge private caveats on the said land. The fate of her third attempt is still unknown. Must Malaysian judges be shackled by Lord Diplock's decision in *Choe Kuan Him*'s case when he ruled that *Damodaran* 'ought not to be followed'? With the greatest of respect to Lord Diplock, he merely glossed through s 25(2) and para 6 of the schedule to the Courts of Judicature Act 1964 (Act 91) without expressing an opinion on those provisions. To illustrate, this was what Lord Diplock said in *Choe Kuan Him*'s case:

> ... nor was s 417 relied on by the Federal Court in *Damodaran v Vesudevan* (ubi sup) as the source of power to order the registration of an order of lis pendens. The statutory source of power relied on by the Federal Court was s 25(2) and para 6 of schedule 1 to the Courts of Judicature Act 1964, which vests in the High Court:
>
> > 'power to provide for the interim preservation of property the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a lis pendens or in any other manner whatsoever.'

It must not be forgotten that: 'Judges are more than mere selectors between rival views — they are entitled to and do think for themselves', per Lord Wilberforce in *Saif Ali v Sidney Mitchell & Co* [1980] AC 198 at p 212; [1978] 3 WLR 849 at p 854; [1978] 3 All ER 1033 at p 1037.

I must place on record that I am not against the doctrine of precedent. All I am saying is that I am against too rigid an application of previous decisions which are bad precedent and all the more so when it is not binding on me. For these reasons, I ruled that though there is no machinery of registering an injunction on the register document of title to the said land in the NLC, yet the injunction that was lodged was in complete compliance with s 25(2) and para 6 of the schedule to the Courts of Judicature Act 1964 (Act 91). In this context, I followed the decisions of Suffian LP and Lee Hun Hoe CJ (Borneo) in *Damodaran*'s case. It is also my judgment that my immediate predecessor was right when he granted the order restraining the registered proprietors in Civil Suit No 22–256–1994, who were similarly the registered proprietors of the said land in the present case, together with their agents in any manner whatsoever from transferring, selling, charging or in any way dealing with the said land until after the trial of the action (*Heng Bak Teong*'s case). Even if I had erred in following the decisions of Suffian LP and Lee Hun Hoe CJ (Borneo) in *Damodaran*'s case, the existence of the restraining order of my immediate predecessor would prevent the said land from being transferred to the plaintiff and this should at any rate protect the defendant's interest pending the disposal of Civil Suit No 22–256–1994.

By way of a postscript I need to make two observations here. Firstly, encl 4 of prayer 1 gives the particulars of the said land as No CT 967, Lot 1996, Bandaran Johor Bahru, Johor whereas the title to the said land as exhibited in 'LKC 16' described the said land as Malay grant 2095, Lot No 1996, in the township of Johor Bahru, in the district of Johore Bahru. If it is true as stated in the title that is exhibited before me, that the said land is comprised in a Malay grant, I was not advised as to whether it can be transferred to the plaintiff. Secondly, in Civil Suit No 22–256–1994, the plaintiff did not intervene and as such they are not parties to the suit. Be that as it may, for the reasons adumbrated above, I disallowed encl 4 with costs.

Application dismissed.

Reported by KH Teo